



DEP Seeking Public Comments on Revised Environmental Justice Policy by May 11th

On March 12, 2022, the Pennsylvania Department of Environmental Protection (Department) shared an updated draft of the Environmental Justice Policy (Draft EJ Policy) for public comment. Among the many changes, the Draft EJ Policy expands the role of the Office of Environmental Justice (OEJ), creates new requirements for unconventional oil and gas, and creates new enforcement priorities for the Department. The Department is accepting comments on the Draft EJ Policy through May 11th.

Pennsylvania's Environmental Justice Policy

The OEJ oversees environmental justice initiatives and policies in the state. The primary goal of the OEJ is to increase communities' environmental awareness and involvement in the Department's permitting process. In 2004, the Department created the Environmental Justice Public Participation Policy (EJ Policy) to provide citizens in environmental justice communities enhanced public participation opportunities during certain Department permit application processes. The EJ Policy is a critical part of the Department's environmental justice initiatives, providing guidelines for the Department's approach to public engagement for permit application reviews in environmental justice areas as defined under the current EJ Policy.

In 2018, the Department circulated a draft revision to the current EJ Policy for public comment. Ultimately, the Department withdrew the proposed draft revisions after public comments were received, and the current 2004 version of the EJ Policy remained in effect. The Department continued to evaluate revisions to the EJ Policy and, in 2021, the Department proposed to update the policy by incorporating, refining, and expanding upon the withdrawn 2018 revisions. On March 12, 2022, the Department released the Draft EJ Policy for a 60-day public comment period with several public meetings and informational webinars.

Significant Revisions and Additions to the Draft EJ Policy

The Draft EJ Policy proposes to make significant changes to the current EJ Policy. Below are some of the most significant changes recommended by the Department:

1. **Incorporation of PA Executive Order on EJ**

The Draft EJ Policy cites and incorporates the requirements Governor Tom Wolf's Executive Order on Environmental Justice (Executive Order 2021-07), which

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was issued in October 2021 and formally established the OEJ. This contextualizes the Draft EJ Policy into the broader effort to address environmental justice across the state executive agencies and federal EJ initiatives. The Draft EJ Policy has been altered throughout to ensure OEJ will meet the requirements of the Order. For more information on the Executive Order, please read our November 2021 *Environmental Alert*: [Governor Wolf's Executive Order and Pennsylvania Legislature Emphasize Environmental Justice](#).

2. OEJ Expanded Roles and Responsibilities

The Draft EJ Policy describes the purpose and responsibilities of the OEJ, which was formally established by the recent Executive Order. The Draft EJ Policy gives the Department new roles and responsibilities and dictates how OEJ will engage with stakeholders and communities going forward. This marks a large expansion of the responsibilities of the OEJ, including coordinating an interagency council on environmental justice for the Commonwealth. By way of example, OEJ will provide training to Department staff, maintain and reassess every two years the EJ Area Viewer, issue an annual report, develop strategic plans every five years, and help create and implement a Language Access Plan for the Department.

3. The Department Maintains Broad Discretion on Opt-In Permits

While listed trigger permits automatically trigger the application of the current policy, the Department maintains the broad discretion to apply the requirements of the Draft EJ Policy to any permits they believe “warrant special consideration,” even if beyond the area of concern. The Draft EJ Policy provides additional guidance to what permits the Department will likely consider an opt-in permit, including a list of permits in Appendix A. However, the Draft EJ Policy further specifies that projects with permit applications that warrant special consideration based on their “reasonably anticipated significant adverse cumulative impacts” may trigger the application of the policy. The Department uses the phrases (1) “reasonably anticipated significant adverse cumulative impacts,” (2) “reasonably anticipated cumulative impacts,” and (3) “anticipated cumulative impacts” in the Draft EJ Policy. None of these three iterations of “cumulative impacts” are defined by the Department in the Draft EJ Policy. The Department has indicated that it has evaluated federal and other state environmental justice law and policy in scoping this Draft EJ Policy. Notably, the Department evaluated the recent [New Jersey Environmental Justice Law](#), which became effective on September 18, 2020 (NJ EJ Law). Under the NJ EJ Law, applications that may “cause or contribute to adverse cumulative environmental or public health stressors” shall be denied a permit. The NJ EJ Law does not define “cumulative environmental or public health stressors.” Without a definition of “cumulative impacts” in the Draft EJ Policy, or under Executive Order 2021-07, it is unclear whether the Department will interpret that phrase similar to the NJ EJ Law. However, the Department’s broad discretion under a subjective standard (“warrant special consideration”) and an undefined cumulative impacts standard make the applicability of the opt-in permit process hard to predict.

4. Updated Definitions of “EJ Area” and “Area of Concern”

EJ Area

Under the current EJ Policy, an EJ Area was defined as census tract with 30 percent or greater minority population or 20 percent or greater population below the poverty line. The Draft EJ Policy defines an EJ Area as “the geographic location where Department’s EJ Policy applies.” Further, it states that the methods for identifying EJ Areas will be specific outside the policy for easier amendment. Because the definition of an EJ Area will live outside the policy, it will be more frequently amended to reflect recent data and definitions used in other agencies and community groups. Thus, the Draft EJ Policy’s application and scope are not clearly defined or entirely predictable.

Area of Concern

The Draft EJ Policy simplifies the current definition. The Area of Concern is defined as the area within a half-mile of the proposed permit activity. The Draft directs applicants to use the new EJ Area Viewer mapping tool to determine if whether a project is in an EJ Area and the project’s Area of Concern.

5. Unconventional Oil and Gas Now Included

Oil and gas unconventional well permits (and change in use) are now considered trigger permits and the Draft EJ Policy includes new, specific provisions for unconventional oil and gas public engagement. Under the Draft EJ Policy these permits will automatically trigger the policy requirements. Unconventional well permits are included in the Draft EJ Policy's list of trigger permits, at Appendix A. While permits listed in Appendix A trigger Sections II ("Permit Review Process") and III ("Community Input") of the Draft EJ Policy, unconventional well permits will only trigger the application of Section IV ("Oil and Gas Public Engagement"). The Draft EJ Policy's Section IV proposes unique public participation requirements for unconventional oil and gas operations. The requirements of Section IV will apply retroactively to unconventional well permits already issued by the Department and create continuing obligations such as annual reports on active and anticipated drilling operations—even though such operations are not subject to an actual permit application submitted to the Department.

6. EJ Areas Viewer Mapping Tool

The Draft EJ Policy requires the use of the new EJ Areas Viewer, which is available at: dep.pa.gov/EJViewer. The EJ Areas Viewer is an interactive mapping tool that contains environmental and demographic indicators, which can be updated and modified by the Department at any time based on new environmental justice related data. Along with other mapping tools, the Department should use the EJ Areas Viewer to assist in decisions regarding all aspects of environmental justice, including determining if a potential opt-in permit should fall under the Draft EJ Policy. Overall, the use of this and other mapping tools will allow the Department and OEJ to consider much more data—environmental, demographic, health, etc.—than under the existing policy.

7. Climate Initiatives

New requirements will push OEJ and the Department to harmonize the environmental justice initiatives with climate change initiatives. This focus will cut across the Department: programs; rulemaking; policies; and enforcement. The Department commits in the Draft EJ Policy to ensure climate-related initiatives will consider and prioritize communities disproportionately impacted by climate change. The Department will also ensure the Climate Action Plan addresses environmental justice and the impact of climate change on EJ Areas. Further, the Department will implement strategies for outreach and engagement with environmental justice and climate change vulnerable communities.

What's Next?

As stated above, the Department will be accepting written comments on the Draft EJ Policy until May 11, 2022 and conducting three public hearings in April. For more information on this public comment period, visit the Department's [website](#).

Babst Calland will be tracking the Draft EJ Policy as the Department responds to comments and moves to finalize the policy this year. If you have any questions about the environmental justice developments described in this Alert, please contact Sean McGovern at 412-394-5439 or smcgovern@babstcalland.com or Evan Baylor at 202-868-0538 or ebaylor@babstcalland.com.

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